

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

ROBERT HICKEY; KENNETH HANKIN;
JENNIFER HUDZIEC; STEPHANIE LANE;
CARROLL JACKSON; DENISE COOPER;
NICOLE PEARSON; and EMILY
MALONEY, on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

THE CITY OF SEATTLE, a municipality;
PAUL SCHELL, Mayor of the City of
Seattle; and NORMAN STAMPER, Chief of
Police of the City of Seattle,

Defendants.

No. C00-1672P

SUPPLEMENTAL BRIEF RE:
UNDISCLOSED WITNESSES

**NOTE ON MOTION CALENDAR:
THURSDAY, JANUARY 15, 2004**

A. FRCP 37 specifically requires exclusion of the witnesses.

FRCP 37's prohibition of evidence and witnesses not timely disclosed is "self
executing" and "automatic" as described by the advisory committee note to the 1993
amendments to the federal rules. Without adequate sanctions the procedure for
discovery would often be ineffectual. Wanderer v. Johnston, 910 F.2d 652 (9th
Cir.1990).

SUPPLEMENTAL BRIEF RE: UNDISCLOSED
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1 The sanctions of FRCP 37, as amended in 1993, created a new sanction – the
 2 “automatic” exclusion of witnesses and information that was not disclosed despite the
 3 duty to do so. The amendment was a departure from the prior rule which did not
 4 automatically mandate sanctions for certain discovery abuses, but placed a burden on
 5 the parties to seek redress when an abuse had occurred. This amendment is
 6 recognized as broadening the sanctioning power of the courts. Klonoski v. Mahlab, 159
 7 F.3d 255, 269 (1st Cir. 1998).

8 The Ninth Circuit has applied the rule as intended by the amendments, and has
 9 affirmed decisions striking evidence and witnesses untimely disclosed. *See, e.g., Yeti*
 10 *by Molly v. Deckers*, 259 F.3d 1101 (9th Cir.2001). There the court discussed the
 11 exclusion of an expert witness due to the untimely disclosure of the expert’s report,
 12 upholding the expert’s exclusion. The court relied on the language of FRCP 37(c)(1)
 13 which specifically precludes from use at trial information not timely disclosed under
 14 FRCP 26(a) or 26(e)(1), and explained that “Rule 37(c)(1) gives teeth to these
 15 requirements by forbidding the use at trial of any information required to be disclosed by
 16 Rule 26(1) that is not properly disclosed.” *Id.* at 1106. The *Yeti* court further explained
 17 that “The Advisory Committee Notes describe [Rule 37(e)(1)] as a ‘self-executing,’
 18 ‘automatic’ sanction to “provide [] a strong inducement for disclosure of material.” *Id.* at
 19 1106.

20 The courts have been clear in their approval of the intention of CR 37 by not
 21 tolerating abuses of the discovery process. *See e.g., Campbell Indus. v. M/V Gemini*,
 22 619 F.2d 24, 27 (9th Cir.1980)(court excluded expert testimony due to ex parte
 23 communications with expert while still retained by the opposing party). Moreover,

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1 "courts have upheld the use of the sanction even when a litigant's entire cause of action
 2 or defense has been precluded." *Id.*, citing Ortiz-Lopez v. Sociedad Espanola de Auxilio
 3 Mutuo, 248 F.3d 29, 35 (1st Cir.2001)(although the exclusion of an expert would prevent
 4 plaintiff from making out a case and was "a harsh sanction to be sure," it was
 5 "nevertheless within the wide latitude of" Rule 37(c)(1)); *see also*, Quevedo v. Trans-
 6 Pacific Shipping, Inc., 143 F.3d 1255 (9th Cir.1998)(court refused to consider expert
 7 report because it was filed 1 ½ months late and the plaintiff could have asked for an
 8 extension of time, but did not).

9 In this case, plaintiffs were specifically requested by interrogatory to provide
 10 information they had regarding individuals with knowledge of the facts and
 11 circumstances underlying this arrest. They failed to reveal that information until the
 12 close of discovery, despite having had the plaintiffs' arrest records and contact
 13 information, obtained from King County, months before the close of discovery. Under
 14 the circumstances, Rule 37's automatic prohibition should apply, to prevent clear
 15 prejudice to the city and to reinforce the importance of abiding by the rules.

16 Plaintiffs' suggestion that the untimely disclosure results in no harm or prejudice
 17 to defendants as defendants could have deposed or otherwise engaged in discovery
 18 with the newly identified witnesses in the short time remaining before trial is nothing
 19 more than a veiled attempt to circumvent the civil rules. Plaintiffs' suggestion places a
 20 burden on defendants to correct the wrong created by plaintiffs' own discovery abuse,
 21 and should not be tolerated.

22 Furthermore, plaintiffs' suggestion is impractical. At the time plaintiffs disclosed
 23 these witnesses, only three months remained before trial. Three months is insufficient

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1 time to engage in a full exchange of discovery and investigation of each of these
 2 witnesses, their knowledge and their background. Plaintiffs' flagrant disregard for the
 3 civil rules for their own benefit, to the detriment of the defendants, cannot, and should
 4 not, be tolerated.

5 **B. Plaintiffs' "Additional Authority" in inapplicable and non-persuasive.**

6 In Plaintiffs' Notice of Additional Authority Regarding disclosure of Third-Party
 7 Witnesses plaintiffs cite to Los Angeles News Service v. CBS Broadcasting, Inc., 305
 8 F.3d 924 (2003)("LANS") for the proposition that the limitations and restrictions placed
 9 upon the disclosure of information by the civil rules stand separate and distinct from the
 10 question of admissibility of that very information. Plaintiffs' proposal is incredulous at
 11 best as it suggests that the civil rules live in a vacuum and have no effect on litigation
 12 procedure.

13 Moreover, the LANS case does not address the issue now before the court,
 14 exclusion of witnesses due to untimely disclosure. In LANS, the issue involved the
 15 admission of evidence obtained pursuant to the confines of a stipulated dismissal
 16 agreement. The parties there entered into a stipulated dismissal, with the caveat that
 17 re-filing of the action would be permitted under certain restrictions. The stipulation
 18 provided in pertinent part that in the event the complaint was refiled the parties would be
 19 "restored to the same litigation positions they currently enjoy," and that the parties would
 20 have "no right to assert new or additional claims or defenses, conduct discovery, . . ."
 21 LANS, at 930. Subsequent to the stipulated dismissal, plaintiffs acquired additional
 22 information they intended to offer as evidence. Defendant objected to the submission
 23 arguing that the submission of such evidence violated the stipulation. In admitting the

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1 evidence the court analyzed the question under the stipulation and reasoned that the
2 information offered as evidence was obtained separate and distinct from the discovery
3 process, and therefore not subject to the terms of the stipulated dismissal. This ruling
4 should be contrasted from cases involving information which is required to be disclosed
5 in the discovery process under the civil rules, which are the facts presented here.

6 It must be pointed out that the LANS decision relied heavily on language from
7 Whittaker Corp. v. Execuair Corp., 736 F.2d 1341 (1984) which was decided prior to
8 the 1993 amendments to CR 37, and case law subsequent thereto. Additionally,
9 Whittaker, like LANS, involves a fact pattern entirely distinct from the one presented
10 here. In Whittaker, the court reversed the exclusion of documents obtained after the
11 discovery cut-off. The documents in question were discovered by the plaintiff in the
12 course of an antitrust action which involved the same parties. The court explained that
13 the documents were obtained outside of the discovery process in the pending action,
14 and hence the discovery cut-off in that action was inapplicable. Again, this ruling should
15 be contrasted from situations where the question of admissibility centers on information
16 required to be disclosed under the civil rules. Hence, plaintiffs' argument is entirely
17 unpersuasive to the issue presented here and the automatic exclusion requirement set
18 forth in FRCP 37.

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1 DATED this 15 day of January, 2004.

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Certificate of Service

I certify that on the date noted below I presented SUPPLEMENTAL BRIEF RE: UNDISCLOSED WITNESSES to the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification of such filing to the following persons:

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and I certify that I have caused to be served in the manner noted below a copy of the above-listed document to the following non CM/ECF participants:

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DATED this 15 day of January, 2004, at Seattle, Washington.



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